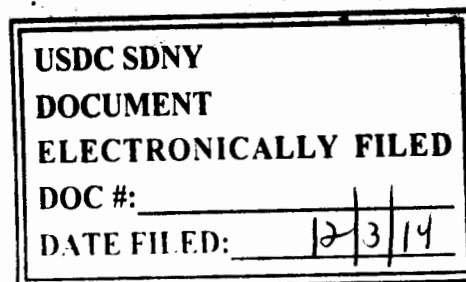


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



\_\_\_\_\_  
FLO & EDDIE, INC.,

Plaintiff,

-against-

No. 13 Civ. 5784 (CM)

SIRIUS XM RADIO, INC., and DOES 1-10,

Defendants.  
\_\_\_\_\_

ORDER DIRECTING RESPONSE

McMahon, J.:

Pursuant to my local rule for motions for reconsideration, I have reviewed the papers in support of Sirius' Motion for Reconsideration or Certification for Interlocutory Appeal. The gravamen of the motion is that *RCA Mfg. Co. v. Whiteman*, 114 F. 86, 87-88 (2d Cir. 1940), a hitherto uncited<sup>1</sup> Second Circuit decision from 1940, held that no common law public performance right existed in sound recordings.

*Whiteman* plainly should have been addressed the first time around, and it must be dealt with now – it is, after all, a Second Circuit decision (albeit a pre-*Naxos* decision) discussing key issues in this case. Sirius has now had its belated say; Flo & Eddie needs to respond – if only to address *Whiteman* in the context of this court's finding, on undisputed facts, that Sirius makes unauthorized, non-fair use copies of Flo & Eddie's master recordings in order to broadcast them, which is a situation rather different than the one contemplated by *Whiteman* (or at least so it seems to me after one quick reading).

Therefore, I ask that Plaintiff respond to the Motion for Reconsideration by next Wednesday, December 10, 2014. Flo & Eddie should address all aspects of Sirius' motion.

I will not accept reply papers; I will also not hold oral argument. I am well aware of the ramifications of my original ruling, which I did not reach lightly. But in the end, this court does not make policy; I deal in law. Sirius has had its say about the law; Flo & Eddie will weigh in in writing; and I will decide whether or not to reconsider my original ruling.

<sup>1</sup> See Brief in Support of Motion for Reconsideration, Docket #100, at 8 ("There is such a case [holding no public performance right in sound recordings], *but it was not addressed in the summary judgment briefing*") (Emphasis added). Just to make certain that the case was not discussed in , we checked the summary judgment briefs, which we still have here in chambers. Sure enough, there is no reference to the *Whiteman* case.

Dated: December 3, 2014



U.S.D.J.

BY ECF TO ALL COUNSEL